United States Department of Labor
Employees' Compensation Appeals Board

B.H., Appellant	)	
and	)	**Docket No. 16-0575**
	)	**Issued: May 11, 2016**
U.S. POSTAL SERVICE, PROCESSING & DISTRUBUTION CENTER, Houston, TX, Employer	)	

Appearances:
Lenin V. Perez, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 1, 2016 appellant, through his representative, filed a timely appeal from a December 18, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant is entitled to a schedule award for a permanent impairment of the upper extremities causally related to his accepted employment injuries.

FACTUAL HISTORY

On September 15, 2010 appellant, then a 53-year-old general expeditor, filed a traumatic injury claim (Form CA-1) alleging that on September 14, 2010, while in the performance of

[1] 5 U.S.C. § 8101 *et seq.*

duty, he fell striking his forehead and right eye. OWCP accepted the claim for right conjunctival hemorrhage, right retinal edema, orbital edema or congestion, a laceration of the right eyelid, an open wound of the face, displacement of a cervical intervertebral disc, brachial neuritis or radiculitis not otherwise specified, joint stiffness at other specified sites, muscle spasms, and concussion without loss of consciousness. OWCP paid appellant compensation for total disability beginning January 16, 2012.[2]

A July 5, 2011 magnetic resonance imaging (MRI) study of the cervical spine revealed degenerative disc disease at multiple levels, a caudal disc extrusion on the right at C3-4, and disc bulging with borderline narrowing of the spinal canal and ventral deformity of the cord at C4-5. An August 8, 2011 electromyogram (EMG) and nerve conduction study (NCS) showed mild-to-moderate bilateral median neuropathy consistent with carpal tunnel syndrome, mild bilateral ulnar neuropathy of the elbow, and no evidence of right cervical radiculopathy or right brachial plexopathy.

A January 8, 2013 EMG and NCS revealed bilateral radiculopathy at C5 and C6 and severe distal sensorimotor peripheral neuropathy.

Appellant voluntarily retired from the employing establishment on January 31, 2013.[3]

Electrodiagnostic testing performed on December 17, 2013 by Dr. Samy F. Bishai, an orthopedic surgeon, revealed carpal tunnel syndrome, right ulnar neuropathy, and slowing of the ulnar nerve velocities possibly showing "underlying cervical-brachial involvement."

In an impairment evaluation dated December 16 and 17, 2013, Dr. Bishai discussed appellant's history of a work injury on September 14, 2010 and reviewed the results of diagnostic studies. On examination of the upper extremities he found bilateral radiculopathy at C5 and C6 and a "motor deficit in the form of weakness of the deltoid and biceps as well as the radial wrist extensors." Dr. Bishai also noted a sensory deficit extending from the shoulders into the hand and thumb. He provided range of motion measurements for the right shoulder. Dr. Bishai diagnosed a large laceration of the face, forehead, and scalp, herniated cervical discs with radiculopathy, cervical degenerative disc disease, internal derangement and impingement syndrome of the right shoulder, tendinopathy of the right supraspinatus and infraspinatus tendons, right rotator cuff syndrome, a partial thickness tear of the subscapularis tendon of the right shoulder, and a resolved concussion.

Citing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), Dr. Bishai found that appellant had 24 percent impairment of the right upper extremity due to loss of motion of the right shoulder using Table

[2] In a decision dated December 16, 2010, OWCP had originally denied appellant's claim for wage-loss compensation beginning October 30, 2010 as the medical evidence was insufficient to show that he was disabled for work.

[3] By decision dated May 28, 2013, OWCP found that appellant received an overpayment of compensation in the amount of $3,445.20 for the period March 1 to April 6, 2013 because he elected regular retirement benefits beginning March 1, 2013 but continued to receive compensation for total disability. It further found that he was at fault in creating the overpayment.

15-34 on page 475. Referencing *The Guides Newsletter*, *Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*), he found 11 percent impairment of both the right and left upper extremity due to moderate sensory and motor deficits at C5 and C6. Dr. Bishai combined the impairment due to loss of shoulder motion with the impairment for right radiculopathy to find 32 percent right upper extremity impairment. He further found 11 percent left upper extremity impairment as a result of radiculopathy.

Appellant filed a claim for a schedule award (Form CA-7) on March 20, 2014. An OWCP medical adviser reviewed the medical evidence on April 7, 2014 and disagreed with Dr. Bishai's rating. The medical adviser noted that August 8, 2011 electrodiagnostic testing did not show radiculopathy and that the range of motion measurements by Dr. Bishai differed from other measurements of record. As such, he recommended referring appellant for a second opinion evaluation.

OWCP, by letter dated November 13, 2014, referred appellant to Dr. Zvi Kalisky, a Board-certified physiatrist, for a second opinion examination regarding the extent of any permanent impairment due to the accepted work injury. It provided him with a statement of accepted facts and a list of accepted conditions, including displacement of a cervical disc and brachial neuritis or radiculitis.

On December 9, 2014 OWCP referred appellant to Dr. Goran A. Jezic, a Board-certified physiatrist, for electrodiagnostic testing. Dr. Jezic performed an EMG and NCS on December 11, 2014 which showed bilateral carpal tunnel syndrome and left cubital tunnel syndrome with otherwise normal findings for the upper extremities and cervical paraspinal musculature, including "no evidence of cervical radiculopathy, brachial plexopathy, or any other peripheral nerve or muscle pathology."

In a report dated December 24, 2014, Dr. Kalisky reviewed appellant's history of injury and the medical reports of record. He noted that a July 5, 2011 MRI scan of the cervical spine showed degenerative disc disease, a right disc extrusion at C3-4, and a C4-5 posterior disc bulge with borderline narrowing of the spinal canal. Dr. Kalisky discussed appellant's symptoms of pain and stiffness in his neck radiating into the right shoulder. On examination, he found "diffuse hypesthesia in the right forearm and hand in [a] nondermatomal distribution" and left hand hypesthesia in a glove distribution, with weakness in the right shoulder and grip. Dr. Kalisky diagnosed cervical strain without objective evidence of radiculopathy. He utilized Proposed Table 1 of the *The Guides Newsletter* and determined that appellant had no impairment of either the right or left upper extremity as he had "no specific dermatomal distribution of pain or paresthesia and there are no objective valid motor or sensory findings and [e]lectrodiagnostic findings of radiculopathy identified…." Dr. Kalisky concluded that appellant had zero percent for the right and left upper extremities.

An OWCP medical adviser reviewed Dr. Kalisky's report and concurred with his finding that appellant had no ratable impairment of either upper extremity based on the lack of objective findings of a motor or sensory deficit.

By decision dated March 19, 2015, OWCP denied appellant's claim for a schedule award. It found that Dr. Kalisky's opinion represented the weight of the evidence and established that he had no impairment as a result of his employment injury.

On March 26, 2015 appellant requested a telephone hearing before an OWCP hearing representative.

At the telephone hearing, held on November 9, 2015, appellant's representative contended that Dr. Bishai's report was entitled to more weight than that of Dr. Kalisky because he was an orthopedic surgeon rather than a physiatrist.

In a decision dated December 18, 2015, an OWCP hearing representative affirmed the March 19, 2015 decision. He found that Dr. Kalisky provided rationale for his opinion and that Dr. Bishai did not rely on current electrodiagnostic testing and provided an impairment rating for a right shoulder condition that had not been accepted.

On appeal appellant's representative contends that Dr. Bishai has experience providing impairment evaluations using the sixth edition of the A.M.A, *Guides*. He also maintains that the award should be based on range of motion as that is most favorable.

LEGAL PRECEDENT

The schedule award provision of FECA,[4] and its implementing federal regulations,[5] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[6] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[7]

Neither FECA nor its regulations provide for a schedule award for impairment to the back or to the body as a whole.[8] Furthermore, the back is specifically excluded from the definition of organ under FECA.[9] The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the extremities. Recognizing that FECA allows ratings for extremities and precludes ratings for the spine, *The*

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] *Id.* at § 10.404(a).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[8] *See N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

[9] *See* 5 U.S.C. § 8101(19); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

Guides Newsletter offers an approach to rating spinal nerve impairments consistent with sixth edition methodology. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP procedures indicate that *The Guides Newsletter* is to be applied.[10]

A schedule award can be paid only for a condition related to an employment injury. The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his employment.[11]

ANALYSIS

As a result of his incident, OWCP accepted appellant's claim for right conjunctival hemorrhage, right retinal edema, orbital edema or congestion, a laceration of the right eyelid, an open wound of the face, displacement of a cervical intervertebral disc, brachial neuritis or radiculitis not otherwise specified, joint stiffness at other specified sites, muscle spasms, and concussion without loss of consciousness.

Electrodiagnostic testing on August 8, 2011 revealed no evidence of cervical radiculopathy or brachial plexopathy. Testing on January 8, 2013 showed bilateral radiculopathy at C5 and C6. Electrodiagnostic testing performed on December 17, 2013 by Dr. Bishai showed carpal tunnel syndrome, right ulnar neuropathy, and possible cervical-brachial involvement in slow ulnar nerve velocities.

In Dr. Bishai's impairment evaluations dated December 16 and 17, 2013, he found bilateral radiculopathy at C5 and C6 and motor deficits and measured range of motion of the right shoulder on examination. He diagnosed a large laceration of the face, forehead, and scalp, herniated cervical discs with radiculopathy, cervical degenerative disc disease, internal derangement, tendinopathy and impingement syndrome of the right shoulder, right rotator cuff syndrome, and a partial thickness tear of the subscapularis tendon of the right shoulder, and a resolved concussion. Dr. Bishai found that appellant had 24 percent right arm impairment as the result of loss of motion of the right shoulder. OWCP, however, has not accepted a shoulder condition as related to the September 14, 2010 employment injury. Dr. Bishai further found that appellant had 11 percent bilateral impairment due to loss of sensory and motor function at C5 and C6. An OWCP medical adviser reviewed Dr. Bishai's report on April 7, 2014 and noted that the initial electrodiagnostic testing performed August 8, 2011 did not show any evidence of cervical radiculopathy. He recommended a second opinion examination.

OWCP referred appellant to Dr. Kalisky for a second opinion examination on the issue of the extent of any permanent impairment. It also referred him to Dr. Jezic for electrodiagnostic testing. On December 11, 2014 Dr. Jezic found that an EMG and NCS performed that date was negative for cervical radiculopathy.

[10] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

[11] *See Veronica Williams*, 56 ECAB 367 (2005).

In his December 24, 2014 report, Dr. Kalisky reviewed the medical reports of record and the results of diagnostic studies. He found hyperesthesia of the right forearm and hand in a nondermatomal distribution and hypoesthesia of the left hand in a glove distribution. Dr. Kalisky diagnosed cervical strain without objective evidence of radiculopathy. Under FECA, impairment from a spinal nerve affecting the upper extremities is properly determined using *The Guides Newsletter*. Dr. Kalisky utilized *The Guides Newsletter* and, citing proposed Table 1, found that appellant had no impairment of either the right or left arm as he had no pain or loss of sensation in a dermatomal pattern on examination or objective findings of radiculopathy on electrodiagnostic studies. An OWCP medical adviser reviewed Dr. Kalisky's report and concurred with his finding that appellant had no impairment of either arm based on the lack of objective findings of a motor or sensory deficit. The Board finds that the opinions of Dr. Kalisky and the OWCP medical adviser are based on a proper evaluation of the diagnostic testing, are based on an accurate factual history, and properly apply the A.M.A., *Guides,* and therefore, constitute the weight of the evidence and establish that he has no impairment of the upper extremities as a result of his September 14, 2010 work injury. As Dr. Bishai did not rely on the current electrodiagnostic testing and provided an impairment rating for appellant's right shoulder that was not an accepted condition, his opinion is of diminished value.[12]

On appeal appellant's representative contends that Dr. Bishai has experience providing impairment evaluations using the sixth edition of the A.M.A., *Guides*. He also maintains that the award should be based on range of motion as that is most favorable. Dr. Bishai diagnosed right shoulder internal derangement, impingement syndrome, rotator cuff syndrome, tendinopathy, and a partial thickness tear and found that appellant had an impairment due to loss of range of motion of the right shoulder. Where a claimant claims that conditions not accepted or approved by OWCP were due to his employment injury, he bears the burden of proof to establish causal relationship through the submission of rationalized medical evidence.[13] Appellant has not submitted such evidence and thus has not met his burden of proof.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he is entitled to a schedule award for a permanent impairment of the upper extremities causally related to his accepted employment injuries.

[12] *Id.*

[13] *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

ORDER

IT IS HEREBY ORDERED THAT the December 18, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 11, 2016
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board